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ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 13-06
Z.C. Case No. 13-06
(Text Amendment – 11 DCMR)
(Text Amendments Relating to Retaining Walls)
March 31, 2014

The Zoning Commission for the District of Columbia (Commission), pursuant to its authority under § 1 of the Zoning Act of 1938, approved June 20, 1938 (52 Stat. 797, as amended; D C Official Code § 6-641 01 (2012 Repl)), hereby gives notice of adoption of the following text amendments to the Zoning Regulations of the District of Columbia, at Title 11 of the District of Columbia Municipal Regulations (DCMR) A Notice of Proposed Rulemaking was published in the *D C Register* on February 7, 2014 at 61 DCR 01039. The amendments add a definition of “retaining wall” to § 199 1 and add a new § 413 “Retaining Walls ” These amendments shall become effective upon the publication of this notice in the *D C Register*.

Description of Amendments

These text amendments clarify zoning regulations as they pertain to retaining walls. The amendments define the term “retaining wall,” establish an overall maximum height for retaining walls in Residence zones subject to location specific limitations, describe the process for measuring retaining walls, and permit the Board of Zoning Adjustment to grant special exception relief for retaining walls not meeting the requirements of new § 413

Procedures Leading to Adoption of Amendments

On March 29, 2013, The Office of Planning (OP) submitted a memorandum that served as a petition requesting amendments to the regulations At its April 8, 2013 public meeting, the Commission voted to set down the proposal for a hearing In addition to providing a new definition for retaining wall and establishing height limitations, the proposed rules provided that a “retaining wall four feet or more in height that elevates the terrain and is back filled with dirt or other fill material would be considered a structure, included in lot occupancy .. ”

A notice of public hearing containing the OP text was published in the May 3, 2013 edition of the *D C Register* at 60 DCR 6475

On July 12, OP submitted a report including an updated version of the advertised text that clarified how to measure the height of a retaining wall and required that retaining walls on a block with street frontage not exceed the height of adjacent retaining walls.

Holland & Knight, LLP submitted a letter dated July 22, 2013 suggesting modifications to the proposed amendment Holland & Knight proposed revisions to § 412 3¹ dealing with the

¹ At the time the text amendments were proposed, the final section of Chapter 4 of the Zoning Regulations was § 411 Accordingly, the proposed new section “Retaining Walls” was numbered § 412 in OP’s petition. After

measurement of required yards in order to create consistency with existing definitions Holland & Knight also proposed that, in order for a retaining wall to be a structure that contributes to lot occupancy, the retaining wall must include geogrid materials, pursuant to a previous Board of Zoning Adjustment decision.²

A public hearing was held on July 22, 2013. Testimony was given by Ms. Alma Gates, on behalf of Neighbors United Trust, and by Mr. Mark Eckenwiler. Ms. Gates testified in support of the amendments with some suggestions for clarification. Ms. Gates proposed clarifying how the six foot maximum height requirement in § 412.4 reconciles with the four foot maximum height in rear or side yards in § 412.2. Next, Ms. Gates questioned whether the prohibition against "paved or otherwise covered" landscape areas in § 412.7 intends to exclude pervious pavers, and suggested the Commission consider circumstances when pervious pavers might be effective and appropriate. Ms. Gates also suggested adding "in public space" to the provision in § 412.3 that prohibits a retaining wall in "any required yard as measured from the property line inward along the street frontage."

Mr. Eckenwiler discussed the proposed amendments as they relate to existing regulations governing accessory buildings. Mr. Eckenwiler noted that the proposed regulation limit a retaining wall to four feet while under § 2500.4, a property owner can build an accessory structure up to fifteen feet tall in the same yard. Mr. Eckenwiler addressed similar concerns about § 412.5, which states that retaining walls shall be considered structures included in lot occupancy. Mr. Eckenwiler indicated that lot occupancy turns on building area, which has an exception for structures that do not extend above the level of the main floor of the building. He believed that this exception could complicate the process of calculating lot occupancy for the purpose of the proposed rule.

The Commission closed the record and requested that OP address these concerns in a supplemental report, which the Commission would consider during its public meeting on September 9, 2013.

OP filed a supplemental report dated August 29, 2013 that provided substantial revisions to the proposed text in response to the issues raised before and during the public hearing. In the revisions, OP eliminated the use of "yard" in response to Holland & Knight's concern about the amendment conflicting with existing definitions. OP responded to Holland & Knight's suggestion to include geogrid materials in the definition of retaining wall by noting that the proposed section is intended to apply to retaining walls more broadly, not only to those that

discovering that separate rulemaking proceedings were underway to create a new § 412, OP renumbered the proposed section "Retaining Walls" as § 413 in its November 22, 2013 report. All references to section and subsection numbers in this document reflect the number assigned to the proposed section at the time the relevant comment or testimony was made.

² In *BZA Appeal No. 17285 of Patrick J. Carome*, the Board found that three elements were required for a retaining wall to constitute a structure that contributes to lot occupancy in the Wesley Heights Overlay District: (i) a wall, (ii) fill dirt, and (iii) a geogrid fabric that holds dirt in place.

include geogrid material. In response to Ms. Gates' testimony, OP clarified the language of § 412.2 and 412.4 to highlight the relationship between the two height limitations. OP created a § 412.11 to address Mr. Eckenwiler's concern regarding lot occupancy measurement and building area. The revisions also clarified how to measure a retaining wall that varies in height.

During the public meeting on September 9, 2013 and in response to a request to reopen the record by Neighbors United Trust, the Commission decided by consensus to schedule an additional public hearing to allow testimony on the most recent OP revisions. In advance of this hearing, the Commission asked OP to clarify the new provision about lot occupancy and to address the regulations for retaining walls that abut an improved alley. The Commission also noted that a variance would be required to obtain relief from the new section's requirements and suggested that OP explore whether special exception relief should be available.

A second notice of public hearing was published in the *D.C. Register* on October 18, 2013 at 60 DCR 14793. As explained in the OP supplemental report dated November 22, 2013, the revised text included a general reorganization and renumbering of the proposed new section (formerly § 412, now § 413). Substantively, revised § 413.3 maintained the overall height limit of six feet, but provided for no restrictions on height for retaining walls adjacent to alleys in R-3 and R-4 zones. Subsection 413.8 clarified that any tiered or terraced retaining walls greater than four feet in height would be calculated as contributing to lot occupancy. Finally, proposed § 413.10 allowed the Board of Zoning Adjustment to grant special exception relief for retaining walls that could not meet the requirements of § 413 upon proof that conditions relating to the building, terrain, or surrounding area would make full compliance unduly restrictive, prohibitively costly, or unreasonable.

The second public hearing was held on December 2, 2013. During the hearing, the Commission voiced concerns about the proposed 1:1 grade for terraced walls, suggesting that this horizontal to vertical ratio may be too steep and therefore impractical. In response to the provision requiring retaining wall measurements to start from the finished grade, the Commission inquired about whether the finished grade could be manipulated in a way that would evade the height requirement.

Ms. Alma Gates, testifying again on behalf of Neighbors United Trust, expressed concern about the lack of a maximum height requirement for retaining walls that abut an alley in the R-3 and R-4 Districts. Ms. Gates also suggested that OP consider more clearly distinguishing the provision regarding special exception relief provision from the requirements for variance relief. Ms. Gates considered the proposed language to be conflating the two standards. In addition, Ms. Gates sought clarification as to how a new property owner would measure the backfill area behind a retaining wall for the purpose of calculating in lot occupancy.

After hearing testimony, the Commission closed the record, aside from requesting a supplemental report from OP addressing the concerns raised at the hearing.

OP filed a supplemental report on January 13, 2014. The report revised the proposed regulation so that retaining walls would be measured from "the lowest level of the ground immediately under the wall" rather than from the finished grade at the bottom of the wall. In addition, a 12 foot height restriction was proposed for retaining walls abutting an improved alley in R-3 and R-4 zones, and maximum slope for terraced retaining walls was revised to a horizontal to vertical ratio of 2:1. In response to the Commission's concerns over the potential manipulation of height measurement, OP added a provision disallowing berms or other forms of intermittent terrain elevation from being included in the measurement of height.

The report also recommended against including retaining walls in the calculation of lot occupancy under any circumstances. OP explained that, in researching this matter, it found that there are no other surrounding jurisdictions that require backfilled retaining walls to be calculated as lot occupancy. The report further noted that retaining walls are regulated through other types of provisions, such as those governing placement and height limitations.

Finally, the report offered no substantive change to the proposed standard for granting special exception relief. OP indicated that the proposed language is similar to other instances when a special exception is required to comply with requirements in addition to those in § 3104.1, and provided examples.

At its meeting on January 27, 2014, the Commission asked OP to consider clarifying the new measurement language because the meaning of the phrase "immediately under the wall" could be taken to mean the subsurface. The Commission then authorized the publication of a notice of proposed rulemaking in the *D.C. Register* of the text as revised in the OP report, subject to the refinement requested, and a referral of that text to the National Capital Planning Commission (NCPC) for the 30-day period of review required under § 492 of the District Charter.

A Notice of Proposed Rulemaking was published in the *D.C. Register* on February 7, 2014 at 61 DCR 1039. In response to the Commission's concerns over the potential ambiguity of the phrase "immediately under the wall," the proposed rules provided that height measurement would be taken from "from the lowest level of the ground at the base of the wall."

The Commission received correspondence from Alma Gates on behalf of Neighbors United Trust in a letter dated February 8, 2014, which was the date immediately after publication of the notice. The correspondence does not purport to be in response to the published notice, but rather states its substance "relates to the Office of Planning's January 13, 2014 Supplemental Report." As such, the comments are not responsive to the Notice of Proposed Rulemaking and could properly be struck from the record. The Commission's actions with regard to the correspondence are discussed later in this Order.

In a letter dated February 7, 2014, the NCPC Executive Director informed the Zoning Commission that, through a delegated action dated January 30, 2014, he found that the proposed

text amendments were not inconsistent with the Federal Elements of the Comprehensive Plan for the National Capital.

At a properly noticed meeting held on March 31, 2014, the Commission considered whether to take final action to adopt the amendments

With respect to the correspondence submitted by Ms. Gates, the Commission decided to permit it to remain in the record. The letter expressed concern over proposed § 413.2 (c), believing that it would allow berms and other forms of intermittent terrain elevation to be included in the measurement of height. Ms. Gates also suggested that retaining wall height should be measured from "natural grade" and that the Commission adopt the definition of that term as advertised in Z.C. Case No. 08-06A for proposed Subtitle B of Title 11. Finally, Ms. Gates recommended that retaining walls should be included in the calculation of lot occupancy under two scenarios.

The Commission was not persuaded that proposed § 413.2 (c), concerning berms and other forms of intermittent terrain elevation should be revised as proposed by Ms. Gates. She suggested that berms "shall not be included," rather than "shall be included" when measuring retaining wall height. The Commission notes that the phrase "shall not be included" also appears in a similar provision added to the definition of "building height" in Case No. 12-11. In that case, Ms. Gates offered the following relevant testimony:

1. Height

A. Definition.

Berms or other forms of artificial elevation shall not be included in measuring building height.

Comment. The prohibition against berms is a very important addition to the regulations!

Z.C. Case No. 12-11 (Exhibit 10)

The Commission agrees with Ms. Gates' original observation and declines to create inconsistent versions of what is essentially the same prohibition.

The Commission was persuaded by Ms. Gates' suggestion that the measuring point for retaining walls should be at the "natural grade" at the base of the wall. The Commission agreed that using this more restrictive term better communicates its intent in establishing height limitations. As to Ms. Gates' suggestion that the Commission use the recently proposed definition of "natural grade," the Commission notes that a definition of the term already exists at § 199. The Commission does not believe it is either wise or necessary to have two separate definitions of the term, with one definition only applying to retaining walls. The current definition is adequate for

this purpose and if the Commission ultimately decides to adopt the version proposed, the revised definition will then apply to these structures

As to including retaining walls in the calculation of lot occupancy, the Commission remains comfortable in its determination not to do so, particularly in view of its decision to measure height from natural grade. The one existing exception is for the type of retaining walls involved in *Appeal No 17285 of Patrick J Carome*. The Commission notes that the *Carome* case involved the unique lot occupancy provision of the Wesley Heights Overlay and the Board's ruling was limited in its applicability to properties located therein. The Commission sees no purpose in extending that ruling, but rather concurs with OP's view that retaining walls can be regulated through other types of provisions, including those adopted in this Order.

The Commission also sought a clarification from OP as to whether the reference to tiered and terraced retaining walls in § 413 8 described a single sloped retaining wall or a series of separate retaining walls that were sloped. OP indicated that the provision was referring to the latter and, at the request of the Commission, agreed to work with the Office of the Attorney General (OAG) to clarify the language of the requirement. At the end of the meeting, the Commission voted to adopt the text amendments, with the inclusion of "natural grade" as a measuring point and with the revisions to be provided by OP and OAG

After the meeting, OAG provided the Commission with a revised version of § 413 8 jointly formulated with OP. However, OAG informed the Commission that the Commission must approve the final wording of each rule it adopts and, therefore, it must vote whether to adopt the proposed revision. Therefore, at a properly noticed public meeting held April 15, 2014, the Commission considered the revised text and took final action adopt the text amendments as revised

Under § 13(d) of the Advisory Neighborhood Commissions Act of 1975, effective March 26, 1976 (D.C. Law 1-21, D.C. Official Code § 1-309.10(d)), the Commission must give "great weight" to the issues and concerns of the affected ANC's. In a letter dated November 16, 2013, ANC 6B indicated that it voted 8-0-2 in support of the proposed amendments at a duly noticed meeting on November 12, 2013 with a quorum present. Although the text of the proposed rule has changed somewhat since the ANC report, the Commission concludes that its action adopting the rule is consistent with the ANC's intent and therefore found its advice persuasive

Title 11 DCMR, ZONING, is amended as follows

Title 11, DCMR, Chapter 1, THE ZONING REGULATIONS, is amended by adding the following definition to § 199 1 in alphabetical order

Retaining Wall - a vertical, self-supporting structure constructed of concrete, durable wood, masonry or other material, designed to resist the lateral displacement of soil or other materials. The term shall include concrete walls, crib and bin walls, reinforced or

mechanically stabilized earth systems, anchored walls, soil nail walls, multi-tiered systems, boulder walls, or other retaining structures

Title 11, DCMR, Chapter 4, **DISTRICT: HEIGHT, AREA, AND DENSITY REGULATIONS**, is amended by adding a new § 413, **RETAINING WALLS**, to read as follows

413 RETAINING WALLS

413.1 In R-1, R-2, R-3, and R-4 Districts a retaining wall may be erected in accordance with the requirements of this section

413.2 The height of a retaining wall shall be determined as follows.

- (a) The height of a retaining wall is the vertical distance measured from the natural grade at the base of the wall to the top of the wall;
- (b) When the height of a retaining wall varies, the height shall be measured at the highest point of the wall, from the natural grade at the base of the wall at that point; and
- (c) Berms or other similar forms of intermittent terrain elevation shall not be included in measuring retaining wall height.

413.3 Subject to the height limitations of § 413.4 through 413.7, the maximum height of a retaining wall shall be six feet (6 ft.).

413.4 A retaining wall shall not exceed four feet (4 ft.) in height in the following locations, unless a lower height is required by § 413.5 and 413.6

- (a) Along a street frontage or property line,
- (b) Within any required side yard,
- (c) In the R-1 Districts, within twenty-five feet (25 ft.) of the rear property line, as measured from the rear property line inward, and
- (d) In the R-2, R-3, and R-4 Districts, within twenty feet (20 ft.) of the rear property line, as measured from the rear property line inward

413.5 A retaining wall located along a street frontage on a block with adjacent existing retaining walls shall not be greater in height than the tallest adjacent existing retaining walls up to the maximum height of four feet (4 ft.)

- 413 6 A retaining wall located on any area between a property line and a building line shall not exceed a maximum height of forty-two inches (42 in).
- 413 7 A retaining wall abutting an improved alley in the R-3 or R-4 Districts shall not exceed a maximum height of twelve feet (12 ft)
- 413 8 Retaining walls may be tiered or terraced provided that the width of the area between each retaining wall is at least twice the height of the lower retaining wall. The area between each wall shall be pervious and may not be paved or otherwise covered with impervious materials
- 413.9 Retaining walls not meeting the requirements of this section, may be approved by the Board of Zoning Adjustment as a special exception pursuant to § 3104 1. In addition to meeting the general conditions for being granted a special exception as set forth in that subsection, the applicant must demonstrate that conditions relating to the building, terrain, or surrounding area would to make full compliance unduly restrictive, prohibitively costly, or unreasonable

On January 27, 2014, upon the motion of Chairman Hood, as seconded by Vice Chairman Cohen, the Zoning Commission **APPROVED** the petition at its public meeting by a vote of 5-0-0 (Anthony J Hood, Marcie I. Cohen, Robert E Miller, Peter G May, and Michael G Turnbull to approve)

On March 31, 2014, upon the motion of Chairman Hood, as seconded by Vice Chairman Cohen, the Zoning Commission **ADOPTED** this Order at its public meeting by a vote of 5-0-0 (Anthony J Hood, Marcie I Cohen, Robert E Miller, Peter G. May, and Michael G Turnbull to adopt)

In accordance with the provisions of 11 DCMR § 3028 8, this Order shall become final and effective upon publication in the D C Register; that is, on June 13, 2014

**ZONING COMMISSION FOR THE DISTRICT OF COLUMBIA
NOTICE OF FINAL RULEMAKING
AND
Z.C. ORDER NO. 13-06
Z.C. Case No. 13-06
(Text Amendment – 11 DCMR)
(Text Amendments Relating to Retaining Walls)
March 31, 2014**

The full text of this Zoning Commission Order is published in the “Final Rulemaking” section of this edition of the *D C Register*